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MCC:JJT:mel:2001V00126

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY,
Plaintiff

v.

JAKE MENDEZ;
JESUS "JESSE" GONZALEZ;
JAMES "JIMMY" SCARBOROUGH; and
KELLY M. KEISER,
Defendants

:
:
:
: Civil No. 1:CV-00-2143
: (McClure, J.)
: (Blewitt, M.J.)
:
:
:

FILED
WILLIAMSPORT, PA

APR 8 - 2002

MAUREN DANDREA, CLERK
KF
Clerk

**REPLY BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS**

Kenney initiated this Bivens action for monetary damages on December 12, 2000, for injuries he incurred while allegedly being assaulted by staff at USP Allenwood on September 29, 1999. An answer to the complaint was filed on September 7, 2001. On February 15, 2002, a motion for judgment on the pleadings was filed on behalf of defendants based on Kenney's failure to exhaust his administrative remedies and the fact that respondeat superior cannot form the basis of liability in a Bivens action.

Kenney's opposition brief fails to address Warden Mendez' respondeat superior argument. Rather, Kenney argues that the Warden is not entitled to qualified immunity--an affirmative defense raised in defendants' answer, but not raised in the motion presently pending before the Court. Defendants' motion for judgment on the pleadings based on respondeat superior should therefore be granted.

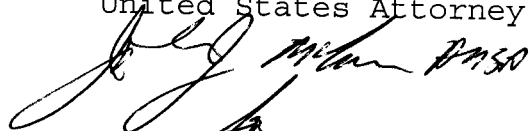
As for the exhaustion argument, Kenney argues that he did exhaust his administrative remedies because he submitted them to each administrative level of the Bureau of Prisons for consideration. However, it is undisputed that Kenney did not initiate the administrative remedy process until a year after the September 29, 1999, incident. As a result, the remedies and appeals were rejected as untimely. Therefore, defendants are entitled to judgment in their favor.

Conclusion

For the above stated reasons, defendants' motion for partial judgment on the pleadings should be granted with a certification that any appeal would be deemed frivolous, lacking in probable cause and not taken in good faith.

Respectfully submitted,

MARTIN C. CARLSON
United States Attorney

A handwritten signature in black ink, appearing to read "Joe Terz", is written over the typed name of Joseph J. Terz.

JOSEPH J. TERZ
Assistant U.S. Attorney
MICHELE E. LINCALIS
Paralegal Specialist
316 Federal Building
240 West Third Street
Williamsport, PA 17703

Date: April 8, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY,	:	
Plaintiff	:	
	:	
v.	:	Civil No. 1:CV-00-2143
	:	(McClure, J.)
JAKE MENDEZ;	:	(Blewitt, M.J.)
JESUS "JESSE" GONZALEZ;	:	
JAMES "JIMMY" SCARBOROUGH; and	:	
KELLY M. KEISER,	:	
Defendants	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

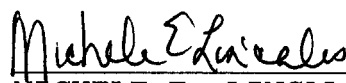
That this 8th day of April 2002, she served a copy of the attached

REPLY BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

ADDRESSEE:

John Charles Kenney
Reg. No. 05238-041
U.S. Penitentiary
1000 Airbase Road
P.O. Box 1000
Pollock, LA 71467


MICHELE E. LINCALIS
Paralegal Specialist